Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILEY F. KIRKSEY, INDIVIDUALLY And as Superintendent of the Greene County Board of Education; ROBERT HINES, CAROL ZIPPERT, CLARENCE E. OUTLAND, LUTHER WINN JR., QUEEN E. CRAWFORD, Members of the Board of Education.

Petitioners,

v.

COLEMAN WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Wiley F. Kirksey, The Greene County Board of Education; Robert Hines, Carol Zippert, Clarence E. Outland, Luther Winn Jr., Queen E. Crawford, as Members of the Greene County Board of Education; petition for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit entered on March 2, 1987.

QUESTIONS PRESENTED

1. Whether the superintendent Kirksey's conduct rises to constitutional dimensions where the

same result would be obtained absent the superintendent's recommendation, where the army's investigation into respondent's conduct began prior to the superintendent's recommendation, where the army allowed plaintiff to present evidence, where the army thereafter independently chose to decertify plaintiff and where respondent's termination was required by law as a result of said de-authorization by the army.

2. Whether the army's independent decision breaks the causal chain and insulates the Superintendent from any alleged wrong doing where the Superintendent did not color or taint the army's independent judgment.

PARTIES TO THE PROCEEDINGS

All named parties to this proceeding are listed in the caption of this petition. However, counsel notes that Board Members Robert Hines and Queen E. Crawfore have retired and Superintendent also retired.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

PARTIES TO THE PROCEEDINGS. 3

TABLE OF AUTHORITIES. 4

OPINIONS BELOW. 5

JURISDICTION. 6

CONSTITUTIONAL AND

STATUTORY PROVISIONS 7

STATEMENT OF THE CASE 11

REASONS FOR GRANTING WRIT. 18

CONCLUSION. 24

APPENDIX

TABLE OF CASES AND AUTHORITIES

CASES

Page

Ames v. United States
600 F. 2d 183 (8th Cir.1979. . . 22

Dellums v. Powell
184 U.S. Ap. D.C. 275, 566 F. 2d
167 (1977) cert. denied, 438 U.S.
916, 97 S.Ct. 3146, (1978). . . . 22

Martin v. Gonzales
459 U.S.1005, 103 S. Ct.(1982). . .22

MT Healthy City School District
Board of Education v. Doyle
429 U.S. 274, 97
S.Ct. 568 (1977). 18,20,21

Smiddy v. Varney 665 F. 2d 261
(9th Cir. 1981) cert. denied 459
U.S. 829, 103 S. Ct.
65 (1982). 22

CONSTITUTIONAL AMENDMENT

United States Constitution

Fourteenth Amendment. 15

STATUTES

42 USC Section 1983. 15

Section 16-24-8 Code of Alabama 1975. 12

Section 16-23-1 Code of Alabama 1975. 12,14

REGULATIONS

JROTC ARMY REGULATION C3, AR 145-2 CH. 6 Par. 6-3 12

JROTC ARMY REGULATION C3, AR 145-2 CH. 6 Par. 6-12 . . . 12

JROTC ARMY REGULATION C3, AR 145-2 CH. 6 Par. 6-26 . . . 12

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 811 F. 2d 561 and can be found in the appendix to this petition at 5a. A Petition for Rehearing was denied by

Order which can be found in the appendix to this petition at 3a The Opinion of the United States District Court For The Northern District of Alabama is reported at_____ F. Supp_____ and can be found in the appendix to this petition at 29a. Upon Motion for a New trial the District court issued another order found in the appendix to this petition at 18a .

JURISDICTION

The Court of Appeal's decision of which review is sought was issued on April 10, 1987. The Petition For Rehearing was denied on April 10, 1987. On May 1, 1987, a stay mandate was granted until June 9, 1987, contingent upon filing of the petition for writ of certiorari. The decision of the United States District Court was issued on December 6, 1985.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AMENDMENTS

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Alabama Statutes

Section 16-24-8 Code of Alabama 1975

states as follows:

Cancellation of contracts-Grounds.

Cancellation of an employment contract with a teacher on continuing service status may be made for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but cancellation may not be made for political or personal reasons. (Acts 1939, No. 499, p. 759; Code 1940, T. 52, Section 358; Acts 1953, No. 773, p.1040.)

Section 16-23-1 Code of Alabama 1975:

Certain public school employees must hold certificate.

No person shall be employed in public schools of the state as county superintendent of education, city superintendent of schools, assistant superintendent, supervisor, principal, teacher or attendance officer unless such person shall hold a certificate issued by the state superintendent of education. (School Code 1927, Section 339;Code 1940, T. 52,Section 322.)

ARMY REGULATIONS

Army Regulations C 3, AR-145-2 Chapter 6 (April 1, 1980) states as follows:

6-3. **Authorized instructors.** Only instructors authorized by this regulation will conduct JROTC/NDCC programs. They are subject to the provisions of this regulation and will be extended the rights and privileges of an instructor as prescribed in here. Only instructors whose qualifications and and subsequent performance are approved by the region commander will be authorized. Application by the individual or by the school for this approval will be considered to constitute a de facto agreement to the conditions prescribed in this regulation. Continued association with the JROTC/NDCC program is contingent uponn the individual meeting these conditions.

6-12. **Equitable procedures** a. Retired members employed as JROTC instructors under 10 USC 2031 aremembers of the Armed Forces not on active duty. The law provides identical authority to the school and the Secretary of the Army to approve the qualifications of administrators and instructors in the program. This dual approval is required for initial and continued employment. The same essential qualifications (other than those related to retired status) and

procedures used for assignment of active duty members will be used in approving JROTC/NDCC instructors.

b. This regulation prescribes the policies and procedures that will befollowed by the Army in determining the qualifications of instructors and in providing information to the schools and to the instructors. The Army expects school authorities to use their own procedures to evaluate instructor qualifications. Schools have the prerogative to continue employment of former JROTC/NDCC instructors to teach subjects not associated with the JROTC/NDCC programs.

6-26. **Performance review.** a. The performance of JROTC/NDCC instructors is under continual review. Units will be visited and and inspected often enough by the region commander and his representatives to ensure the sustained effectiveness and adequacy of performance of instructors. If the region commander receives information that casts doubt on the performance of any instructor, action will be taken under paragraphs b or c below.

b. In the case of active duty instructors, the region commander may take any appropriate action in keeping normal military judicial and/or administrative procedures. See paragraph 6-27.

c. In the case of nonactive duty instructors, the authorization of the region commander is required to employ an individual in any JROTC/NDCC teaching or

administrative capacity. This authorization may be withdrawn as well as granted. Should it be determined that the performance, behavior, or qualifications of a nonactive duty instructor are less than satisfactory, the region commander may take one or more of the following actions-

(1) Counsel the individual directly or by letter.

(2) Recommend to the host school concerned that employment of the individual inJROTC/NDCC be terminated. See paragraph 6-27 below.

(3) Withdraw authorization for employment in JROTC/NDCC. On the effective date specified by the region commander, Army salary support will cease and the individual must be disassociated from the program. Before withdrawing the authorization, the individual should be notified of the proposed action, the basis for the action, and allowed to submit comments or reply to the region commander for review.

STATEMENT OF THE CASE

In August of 1983, respondent Washington and a fellow JROTC instructor engaged in a fist fight on school property. Respondent's conduct triggered two independent but simultaneous investigations and disciplinary proceedings; one by the

Superintendent, appellant Kirksey on behalf of the Greene County Board of Education and the other by the Department of The Army. Since respondent was a tenured JROTC instructor, he was subject to both the Alabama teacher tenure law provisions (Sections 16-24-1 to 16-24-38 Code of Alabama 1975) and Army JROTC regulations (C3, AR-145-2).

In December of 1983, respondent Washington was recommended for termination by the Superintendent because of his participation in the fist fight. Pursuant to the teacher tenure law respondent was granted a hearing before the Board of Education, however, during the course of said hearing the Board and respondent agreed to a settlement of the case. Respondent agreed to a 90 day suspension without

pay and dismissal of the charges in lieu of termination. Subsequent to said settlement agreement, the Superintendent wrote the Department of the Army, accurately reported the proceedings before the Board of Education and expressed a personal dissatisfaction with the Board's decision to discipline respondent Washington but not Belton, the other participant in the fight. The superintendent then recommended the army de-authorize both participants in the fight.

In February of 1984, after conducting its simultaneous but independent proceedings and after allowing respondent Washington an opportunity to respond, the Department of the Army withdrew respondent Washington's authorization to teach, mandated his

separation from the JROTC program; but, like the Board, chose not to discipline Belton. Prior to the Army's Action, respondent Washington was only authorized to teach JROTC. He did not possess a state teaching certificate in any other area as required by Section 16-23-1 Code of Alabama (1975). Once the Army withdrew respondent's authority to teach JROTC, appellant Kirksey made a second recommendation to the School Board that Washington be terminated; this time on the basis that Washington was no longer authorized to teach JROTC. The Board voted to terminate Washington's contract on that basis.

On May 21, 1984, respondent filed a complaint in the United States District Court alleging that Kirksey's recommendation to the army constituted

fraud and misrepresentation; violated rights secured by the First, Fifth and Fourteenth Amendment, 42 USC 1983 and invoked 28 U.S.C. Sections 1331, 1343 as the basis for federal jurisdiction.

Defendants included Superintendent Kirksey, in his official and individual capacity, The Greene County Board of Education, Robert Hines Carol Zippert, Clarence Outland, Luther Winn Jr., Queen E. Crawford Individually and as members of the Greene County Board of Education.

Respondent sought declaratory and injunctive relief, reinstatement, backpay, compensatory and punitive damages in the amount of ONE MILLION DOLLARS ($1,000,000.00) for the alleged deprivation of substantive and procedural due process, fraud, cost and

attorney's fees. The first amendment claim was later abandoned, and upon motion by appellant-defendants the pendent tort claims were dismissed against the Board of Education and defendants in their official capacities. The case proceeded to trial on all other claims.

At the close of trial the court held there was no evidence of fraud; however, appellant Kirksey was held to have nullified the settlement agreement by recommending that the army de-authorize both participants in the fight. The court also held that the Board of Education ratified the Superintendent's conduct by terminating respondent's contract upon de-authorization by the army.

Respondent was awarded TWENTY-FIVE

THOUSAND FOUR HUNDRED NINETY-TWO DOLLARS and Sixty Eight Cents ($25,492.68) as backpay from defendant Kirksey and defendant Board members in their individual capacities, and punitive damages in the amount of TEN THOUSAND DOLLARS ($10,000.00) from the said individual defendants. Defendants were held to be jointly and severally liable for the damages. The Greene County Board was ordered to reinstate respondent as a tenured teacher.

On appeal, the eleventh circuit adopted the lower court's opinion and affirmed as to appellant Kirksey but reversed as to all other defendants.

REASONS FOR GRANTING THE WRIT

In Mt Healthy City School District Board of Education v. Doyle 429 U.S. 274, 97 S. Ct. (1977) this Court formulated a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. In that case, a teacher discharged from his employment brought an action against his former employer for reinstatement and backpay. The teacher alleged he had been discharged in violation of the First and Fourteenth Amendments and it was established that a substantial part of the decision not to renew the teacher's contract was due to his exercise of constitutionally protected activity. The Court found the

rule of causation used by the District court flawed in that it would require reinstatement in cases where the said protected activity does play a part in the decision even if the same result would have been reached had the incident not occurred. The Court held, inter alia, the fact that constitutionally protected activity played a part in the decision not to rehire the teacher did not necessarily amount to a constitutional violation. The case was remanded to determine whether the Board of Education would have made the same decision even in the absence of the protected conduct by the teacher.

In the instant case, the superintendents liability rest on the single fact that he recommended the Army deauthorize respondent after the

settlement agreement. Pursuant to Mt. Healthy the courts are required to inquire whether the same result would be obtained absent the Superintendent's recommendation. In order to find the Superintendent liable, the courts below presumed that (1) the Army failed to exercise its independent judgment and (2) that but for the Superintendent's recommendation the Army would not have de-authorized respondent. Since the Army was not made a party to these proceedings and since the decision of the Army was not challenged and Army officials rendering the decision were not called as witnesses, the record does not provide any support for the foregoing presumptions. In fact, the courts are held, by law, to a contrary presumption. - The Department of the

Army's decision is entitled, at minimum, to a presumption of correctness. That presumption is bolstered by the fact that the Army like the Board of Education chose not to follow the superintendent's recommendation to discipline both participants and chose instead to discipline only the respondent. The record establishes appellant Kirksey accurately reported all proceedings before the Board to the Army, including the settlement; He did not mis-inform, he did not taint their proceedings. These facts establish a stronger case than that presented by the City School District in Mt. Healthy (supra).

Appellants find further support for the granting of the writ in a line of appellate cases which held that an

intermediary's independent decision breaks the causal chain and insulates the alleged wrongful actor from future liability if, and only if, the officer does not color the intermediary's independent judgment by exerting pressure or presenting false evidence.1/ Smiddy v. Varney 665 F. 2d 261 (9th Cir 1981) cert denied 459 U.S. 1829, 103 S. Ct. 65 (1982); Ames v. United States 600 F. 2d 183 (CA 8 1979); and Dellums v. Powell 184 U.S. App. D.C.

1/ Appellants are not aware of any case in which this court has decided this aspect of the issue, however, Justice White's dissenting in Martin v. Gonzales 459 U.S. 1005, 103 S. Ct. (1982) remarked that this causation issue will be important if not dispositive of many Section 1983 cases and argued for a grant of certiorari on that basis.

275, 566 F. 2d 167 (1977) cert denied, 438 U.S. 916, 98 S. Ct. 3146, (1978).

As was noted above, appellant Kirksey did not misinform, taint or exert any undue pressure on the Army, and the Army's decision has never been attacked as lacking in independence or validity. Administrative procedure, whether that of the Army or the Board of Education is intended to provide due process and thereby serve to prevent possible transgressions by its officers. If the administrative process works as intended and the result coincides with an alleged unlawful intent or conduct of an officer, the alleged wrongdoer is insulated because the act had no effect. Borrowing an awkward analogy from criminal law; one cannot be charged

with the murder or attempted murder of a corpse. Kirksey's conduct may amount to an attempted repudiation or a contract but not a consitutional violation.

CONCLUSION

The panel's opinion, and that of the district court, held the Superintendent's conduct undermined the settlement agreement without determining whether the superintendent's recommendation caused the Army to deauthorize respondent. It is obvious that if the Army had mirrored the Board's action or had absolved both participants from any wrongdoing no liability would attach to the Superintendent. In order for said liability to occur, It is essential

that the presumption of correctness attached to the Army's decision be defeated by a showing that absent the Superintendent's recommendation the Army would not have de-authorized respondent, or by a showing that the Superintendent tainted the Army's independent judgment. This second theory of causation begins with the presumption that the intermediary's decision is valid and independently rendered unless there is evidence of undue pressure or attempts to mislead the intermediary. There are no facts in this case to conclude the Army's decision was compromised by appellant and neither the trial or appellate courts addressed these issues.

Dated: Birmingham, Alabama
June 2, 1987

Respectfully submitted,

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PUBLISHER'S NOTE:

Original Pagination is not continuous.

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELENVENTH CIRCUIT

No. 86-7033

COLEMAN WASHINGTON,

Plaintiff-Appellee,

vs.

WILEY F. KIRKSEY, Individually and as Superintendent of the Greene County Board of Education; ROBERT HHINES, CAROL ZIPPERT, CLARENCE E. OUTLAND, LUTHER WINN, JR., QUEEN E. CRAWFORD, Individually and as Members of the Greene County Board of Education; and THE GREENE COUNTY BOARD OF EDUCATION,

Defendants-Appellants.

----------x

Appeal from the United States District Court for the Northern District of Alabama

ORDER:

() The motion of Appellants Wiley F. Kirksey, et al. for X stay _ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellants Wiley F. Kirksey, et al. for X stay _ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including June 9, 1987, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

() The Motion of_____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

() IT IS ORDERED that the motion of _____for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7033

COLEMAN WASHINGTON,

Plaintiff-Appellee,

vs.

WILEY F. KIRKSEY, Individually and as Superintendent of the Greene County Board of Education; et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING

BEFORE: HILL and HATCHETT, Circuit Judges and THOMAS*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*Honorable Daniel H. Thomas, Senior District Judge for the Southern District of Alabama, sitting by designation.

Coleman WASHINGTON,
Plaintiff-Appellee,

v.

Wiley F. KIRKSEY, Individually and as Superintendent of the Greene County Board of Education; Robert Hines, Carol Zippert, Clarence E. Outland, Luther Winn, Jr., Queen E. Crawford, Individually and as Members of the Greene County Board of Education; and the Greene County Board of Education, Defendants-Appellants.

No. 86–7033.

United States Court of Appeals,
Eleventh Circuit.

March 2, 1987.

Appeal from the United States District Court for the Northern District of Alabama.

Before HILL and HATCHETT, Circuit Judges, and THOMAS*, Senior ~~Circuit~~ District Judge.

HILL, Circuit Judge:

Coleman Washington, a former teacher and JROTC instructor at Eutaw High

*Honorable Daniel H. Thomas, Senior U. S. District Judge for the Southern District of Alabama, sitting by designation.

School in Greene County, Alabama, brought this action under 42 U.S.C. § 1983, contending that he was dismissed from his tenured position without due process of law. The United States District Court for the Northern District of Alabama held in favor of Washington against all defendants. We affirm the district court's decision with regard to Wiley Kirksey, superintendent of the Greene County Board of Education. Judgment with regard to the remaining defendants, all of whom were members of the Greene County Board of Education, is reversed.

On or about August 30, 1983, Washington and a fellow JROTC instructor engaged in a fist fight on school property. Superintendent Kirksey initiated an investigation and notified the Army of the incident. The Army investigator initially recommended that both instructors be reprimanded by the Army. As a result of Kirksey's independent investigation, Washington was suspended and the School Board notified Washington of its intent to cancel his contract. Washington was notified of his right to a hearing and the date such a hearing would be held. At this hearing, an agreement was reached be-

tween Washington and the School Board; Washington was to receive a written reprimand and ninety day suspension without pay rather than being dismissed. This settlement was subsequently put in writing. Minutes of the School Board meeting reflect that Kirksey participated in this settlement. Under Alabama law, Kirksey, as superintendent, is required to enforce agreements of the School Board.

Subsequent to Washington's settlement, the Board met to determine the fate of the other officer, Taylor Belton, involved in the altercation. Belton, however, refused to settle with the School Board and declined to accept a ninety day suspension. The Board resolved to retain Belton without imposing disciplinary sanctions. Rather than allow Belton to go unpunished, Kirksey wrote the Army requesting that Washington and Belton be decertified from the JROTC program. The Army proceeded to deauthorize Washington, but not Belton.

Prior to the Army's action, Washington was only authorized to teach JROTC. He did not possess a state teaching certificate in any other subject as required by Ala. Code § 16–23–1 (1977). With the Army's action, Washington was no longer autho-

rized to teach JROTC. Kirksey, therefore, made his second recommendation to the School Board that Washington's contract be terminated; this time on the basis that Washington was no longer authorized to teach JROTC. The Board voted to terminate Washington's contract. Washington contends that his termination constituted a deprivation of property without due process of law.

I. Jurisdiction

[1, 2] Defendants' first contention is that the district court lacked subject matter jurisdiction. It is alleged that Washington's claim is based solely on the breach of the settlement; such a claim being a state action for breach of contract, appellant contends no federal question exists. Washington's claim, however, is that he was denied due process of law because the hearing which he was afforded was vitiated by the state's action. In essence, Washington argues that this hearing was but a farce, and he was therefore denied due process of law. Defendants' arguments go to the merits of Washington's claim and not its jurisdiction basis. When a claim is based upon a constitutional provision, federal subject matter jurisdiction has been

established provided the alleged claim is not wholly frivolous. *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); *see also* C. Wright, The Law of Federal Courts § 18, at 102 (4th ed.1983) ("[F]ederal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right."). The district court properly asserted jurisdiction over the present claim.

II. Denial of Due Process Based Upon Breach of Settlement Agreement

[3] It is uncontested that Washington was a tenured school teacher and held a property interest in his job. *See Smith v. Alabama State Tenure Comm'n*, 430 So.2d 877 (Ala.Civ.App.1982). Under Alabama law, Washington could not be dismissed except for just cause. Ala.Code § 16–24–2, –8 (1977). Having established a property interest in his continued employment, Washington could not be dismissed without notice and hearing. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

A. Defendant Kirksey

Kirksey asserts that Washington was afforded all the process which he was due. Kirksey points to the fact that Washington was given notice of an opportunity to be heard on two occasions. We agree with the district court that Kirksey "abrogated the valid product of a due process hearing, thereby nullifying the due process originally afforded through that hearing." Memorandum Opinion at 11.

[4, 5] In *Galvon v. Press*, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954), the United States Supreme Court characterized fair play as the essence of due process. Kirksey's conduct drained the hearing afforded of any element of fairness. When state officials enter into a settlement agreement by which a state employee relinquishes his right to a hearing required by the due process clause of the fourteenth amendment, due process is violated when the state totally breaches the settlement agreement. In such a case, the employee has bargained away his right to be heard in exchange for the assurance that the state will recognize his property interest as defined by the settlement. Here the plaintiff

was deprived of a meaningful hearing because of his reliance upon the state's agreement to fulfill its portion of the agreement. At no time did the plaintiff have the opportunity to present to the Board his version of what happened. At the first hearing, he was deprived of this opportunity because he mistakenly believed that the settlement agreement would be honored by the state. At the second hearing, events put into motion by superintendent Kirksey rendered moot the issue of the degree of Washington's culpability in the altercation. It is the opportunity to be heard which is protected by the fourteenth amendment. Due process of law does not allow the state to deprive an individual of property where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard. In essence, Washington was bargained out of his right to a hearing. When this agreement was sabotaged by Kirksey, the hearing which was afforded to Washington effectively became a charade.

The evidence shows, and the district court so found, that Defendant Kirksey participated in the settlement agreement. Kirksey recognized that he had a duty to enforce the agreement. He intentionally

wrote the ROTC to assure that Washington was penalized for his acts. This conduct was in breach of the settlement agreement. Ample evidence supports the district court's finding that Kirksey, acting under color of law, violated Washington's constitutional rights.

B. Remaining Defendants

The district court found the remaining defendants, members of the Greene County School Board, liable based upon their subsequent ratification of Kirksey's conduct: "The Board made this violation of due process its own when it ratified Kirksey's action by firing plaintiff based on the result achieved by [Kirksey's letter to the ROTC]." Memorandum Opinion at 6. We reverse the district court on this issue.

[6] The School Board's conduct did not constitute a ratification of Kirksey's conduct. Ratification requires an intentional undertaking by an entity to adopt the conduct of another as its own. Such an intentional undertaking cannot be found here. Washington was only certified to teach JROTC. Under Alabama law, a teacher is not permitted to teach any subject in which he is not certified. Once the Army revoked

Washington's authority to teach JROTC, the School Board was left with three options. First, they could allow Washington to continue to teach JROTC and risk the wrath of the U.S. Army and consequential loss of federal funds. Second, they could allow Washington to teach another subject in violation of Alabama law. Third, they could terminate his contract because he no longer could teach in the Alabama school system. Choosing to pursue the third and only viable option available to the School Board cannot be deemed a ratification of Kirksey's conduct.

III. Qualified Immunity

[7] Kirksey contends that the district court erred in failing to find that his conduct would be shielded from liability under the doctrine of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court established an objective test of qualified immunity: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). The district court properly held that Kirksey's actions were not protected from liability by qualified immunity.

Kirksey should have been aware that a tenured teacher cannot be terminated without notice and hearing. The evidence shows he was aware of the settlement reached between Washington and the School Board. Kirksey proceeded to revoke Washington's opportunity to be heard by intentionally circumventing the settlement agreement reached. Washington pos-

sessed a clearly established constitutional right to a hearing prior to termination. That hearing was clearly vitiated by the direct action of Kirksey.

IV. Award of Punitive Damages

[8] Kirksey contends that his conduct, although perhaps an error in judgment, does not support an award of punitive damages. Punitive damages are appropriate under § 1983 when a defendant's conduct was "motivated by evil motive or intent, or when it involves a reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983). In light of Washington's protected property interest in his tenured position as a teacher, Kirksey's callous refusal to comply with the letter and spirit of the settlement agreement reached justifies an award of punitive damages. *Cf. Barnett v. Housing Authority*, 707 F.2d 1571 (11th Cir.1983). The district court's decision was not clearly erroneous. *See Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir.1985).

AFFIRMED in part and REVERSED in part.

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

----------x

COLEMAN WASHINGTON,

Plaintiff,

v. 84-Civ.G-1320-W

WILEY F. KIRKSEY, Individually and as Superintendent of the Greene County Board of Education; et al.,

ORDER

Defendants.

----------x

This cause came before the court on Motion for new trial or, in the alternative, to alter or amend judgment. Having considered the motion, the court is of the opinion that the motion is due to be and it hereby is DENIED.

Court discusses briefly some of the issues raised in this motion in a memorandum opinion filed contem

poraneously herewith.

The decision of the court in this cause is hereby RATIFIED and REAFFIRMED in its entirety.

DONE and ORDERED this 19 day of December 1985.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

----------x

COLEMAN WASHINGTON,

Plaintiff,

-against- 84-Civ.G-1320-W

WILEY F. KIRKSEY, Individually and as Superintendent Of the Greene County Board of Education; et al.,

MEMORANDUM OPINION

Defendants.

The court will respond briefly to some of the issues raised in defendants' motion for new trial or, in the alternative, to alter or amend judgment. The court does this as guidance to and clarification of the issues for the defendants.

In paragraph five of their motion

defendants contend that they raised the defense of qualified immunity as to liability in their individual capacities, citing paragraph one of their answer as containing this defense. The court suggests that defendants reread their answer. It plainly refers to qualified immunity only in reference to their official capacity. Defendants should also take note of the court's thorough treatment of this issue in its opinion in this cause. The court noted that the issue was raised at trial and in post-trial briefs.

Paragraph nine of the motion states that Superintendent Kirksey's letter was sent to the Army as part of the procedure. The implication here is that Kirksey's

action was expected or required under the cited regulations. The court found that the Army's investigation was completed long before Kirksey's letter was sent. Opinion, page 6.

Defendants are referred to page four of the court's opinion concerning Ms. Zippert's foreknowledge of Kirksey's action. The court is totally cognizant of the testimony on that fact.

In their motion, defendants contend that the Army was a necessary party to this action. The relief given by this court in no way affects the Army's rights or property. The court, therefore, finds that the Army was not an indispensable party.

The court has taken the whole of defendants' motion into careful consideration and finds no substance to it. All matters raised were carefully and fully considered by the court in reaching its decision in this cause. There is no merit in defendants' motion.

DONE this the 19 day of December 1985.

UNITED STATES DISTRICT JUDGE
J.FOY GUIN

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

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COLEMAN WASHINGTON,

Plaintiff,

-against- 84 Civ. G-1320-W

WILEY F. KIRKSEY, Individually and as Superintendent of the Greene County Board of Education; ROBERTS HINES, CAROL ZIPPERT, CLARENCE E. OUTLAND, LUTHER WINN, JR., QUEEN E. CRAWFORD, Individually and as Members of the Greene County Board of Education; GREENE COUNTY BOARD OF EDUCATION,

FINAL ORDER

Defendants.

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After a full trial on the merits, and in conformity with the memorandum opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that judgment be and it hereby is ENTERED in favor of the plaintiff and against

defendants Wiley F. Kirksey, Robert Hines, Carol Zippert, Clarence E. Outland, Luther Winn, Jr., and Queen E. Crawford, in their individual capacities, in the sum of $25,492.68 as back pay. Said defendants are held to be jointly and severally liable for these damages.

It is FURTHER ORDERED that judgment be and it hereby is ENTERED in favor of plaintiff and against defendants Wiley F. Kirksey, Robert Hines, Carol Zippert, Clarence E. Outland, Luther Winn, Jr., and Queen E. Crawford, in their individual capacities, in the sum of $10,000.00 as punitive damages. Said defendants are held to be jointly and severally liable for these damages.

It is FURTHER ORDERED that defendant Greene County Board of Education

reinstate plaintiff as a tenured teacher in its school system in accordance with Alabama State Tenure Commission's decision to reinstate plaintiff's tenured status.

It is FURTHER ORDERED that defendant Greene County Board of Education assign to plaintiff duties appropriate to one in the position of a tenured teacher. These duties should be in no way demeaning or retaliatory. The court would have no objection to the Board's requesting reversal of the Army's decertification of plaintiff, thereby allowing the Board to put plaintiff to work as a JROTC instructor.

It is FURTHER ORDERED that said reinstatement will carry with it the pay level to which plaintiff would have been entitled had this cause not arisen.

Said pay is to commence upon the date of this order. It is to include the 4.66 per cent raise shown at trial to be due for 1984-85 and any percentage increase applicable for 1985-86. This salary is to be paid at the rate appropriate for a tenured teacher with plaintiff's number of years of service. These years of service shall include the period of the pendency of this action.

It is FURTHER ORDERED that plaintiff's attorney, Ray Ward, have and recover fees and costs for services rendered in this cause from defendant Greene County Board of Education and defendants Wiley F. Kirksey, Robert Hines, Carol Zippert, Clarence E. Outland, Luther Winn, Jr., and Queen E. Crawford, individually and in their official capacities. Said defendants are held to be jointly and

severally liable for said fees and costs. This award is made pursuant to 42 U.S.C. Section 1988, and is contingent upon the above-named attorney's timely filing of a proper fee petition with this court under local rule 11. Upon approval of such fees and costs by the court, a separate order will be entered specifying the exact amount due to plaintiff's attorney.

DONE and ORDERED this the 6 day of December 1985.

UNITED STATES DISTRICT JUDGE

J. FOY GUIN, JR.

UNITED STATES DISTRICT COURT
NORTHE5RN DISTRICT OF ALABAMA
WESTERN DIVISION

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COLEMAN WASHINGTON,

Plaintiff,

v. 84 Civ. G-1320-W

WILEY F. KIRKSEY, Individually and as Superintendent of the Greene County Board of Education;ROBERT HINES CAROL ZIPPERT, CLARENCE E. OUTLAND, LUTHER WINN, JR., QUEEN E. CRAWFORD, Individually and as Members of the Greene County Board of Education; GREENE COUNTY BOARD OF EDUCATION,

MEMORANDUM

OPINION

Defendants.

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The plaintiff, Coleman Washington, brought this action pursuant to 28 U.S.C. Sections 1331, 1343 and 42 U.S.C. Section 1983. Full hearing on the merits was held before this Court on February 20, 1985.

This case arises out of the dismissal of plaintiff from his position as a tenured teacher at Eutaw High School in the Greene County, Alabama, school system. Plaintiff was removed by a vote of the Greene County Board of Education (hereinafter the Board). The route by which the Board arrived at this decision circumvented the law and violated plaintiff's constitutional rights.

Plaintiff was a state certified teacher with tenure rights as defined under Sections 16-23-1, et seq., and Sections 16-24-1, et seq., of the Code of Alabama 1975. Mr. Washington was a Junior Reserve Officers' Training Corps (hereinafter JROTC) instructor. In

order to hold this position, he was required to have authorization from the United States Army in addition to his state certification. Prior to the events giving rise to this case, plaintiff held all necessary certification and authorization to qualify him as a JROTC instructor, but he was not, and is not, certified to teach in any other subject area.

On or about August 30, 1983, plaintiff engaged in a fist fight with another JROTC instructor on school grounds. Defendant Superintendent Wiley Kirksey (hereinafter Kirksey) and the Army each conducted an investigation of the incident. After an independent investigation, the Army's investigating officer, Colonel Ware, recommended the

participants be reprimanded. After his investigation was completed, Kirksey suspended plaintiff without pay at the close of school November 18, 1983, and notified plaintiff of the Board's intention to cancel his contract based on Kirksey's recommendation. Plaintiff notified Kirksey of his intention to oppose his firing. The Board's hearing was held on December 12, 1983.

Defendant Kirksey stated under oath on the witness stand before this Court that he was not present and did not take part in these proceedings. However, sworn testimony of other witnesses and letters from Kirksey himself which were entered into evidence established that Kirksey did indeed participate in this hearing. The very minutes of the December 12 meeting state that the Board's counsel

and the superintendent met privately with plaintiff during the course of that meeting regarding the settlement which was reached. This Court does not countenance such dissimulation from a witness before it.

During the course of this hearing, the defendants and their attorney proposed that plaintiff voluntarily accept a 90-day suspension without pay in return for the Board's agreement to drop the charges and to end the termination hearing. Also, a letter of censure was to be placed in plaintiff's personnel file. This settlement was put in written form and signed by plaintiff and the defendant Board members within a few days of the meeting. Defendant Kirksey was not required to sign this document and did not do so. However, under

Section 16-9-13 of the Code of Alabama 1975, Kirksey was charged with the duty as superintendent to uphold and enforce the agreements and decisions of the Board. Kirksey, himself, admitted on the stand at trial that he was duty bound to uphold this settlement agreement.

Despite this knowledge of duty, on December 23, 1983, defendant Kirksey wrote a letter to the ROTC Regional headquarters. This letter's entire purpose was to subvert the settlement agreement. Kirksey summarized the outcome of the Board's hearing, and he correctly noted plaintiff's suspension and the fact that the other participant in the fight refused to accept the identical settlement to which plaintiff had agreed. As a result, the other

participant went essentially unpunished, because the Board refused to terminate his contract. Without permission of the Board, Kirksey went on to request that the Army's authorization of the participants in the fight be revoked. He also reminded the ROTC officials that he had previously requested the revocation of the authorization of the commanding officer who witnessed the fight and failed to intervene. Kirksey did this knowing he had a duty to uphold the Board's valid, signed agreement with plaintiff which fixed their respective rights and which stated on its face that it was a final resolution of the incident. This letter was written and sent without authorization by the Board. However, testimony showed that the president of the Board, Carol Zippert, was told by

Kirksey of his intention to write it and that she did not object.

Within twelve days of Kirksey's letter to the Army, plaintiff's JROTC authorization was withdrawn by the Army. The Board held a hearing on May 3 and 4, 1984, and voted to cancel plaintiff's contract because he no longer held the Army authorization required for JROTC instructors. On July 12, 1984, subsequent to the filing of, but independent of, this suit, the Alabama State Tenure Commission reinstated plaintiff's tenured status and reversed the Board's cancellation of plaintiff's contract.

Suit was filed in this Court seeking relief under 42 U.S.C. Section 1983 and under Alabama state law for fraud and

misrepresentation. Defendant Greene County Board of Education and the other defendants in their official capacities were dismissed from the case as to the tort claims for fraud and misrepresentation under state law on defendants' motion to dismiss for lack of jurisdiction. All other jurisdiction was retained by the court.

Section 1983 of Title 42 of the United States says:

> Every person who, under the color of any statute, ordinance, regulation, custom, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution andlaws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

We deal here with a deprivation of property without due process of law. Tenure is a specific benefit or property interest which is safeguarded by due process. Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Smith v. Ala. State Tenure Comm'n, 430 So. 2d 877 (Ala. Civ. App. 1982). The Courts of Alabama have recognized that "the Tenure Act grants to teachers a property interest which, when perfected, is entitled to constitutional due process protection.: Id. at 879. Plaintiff in the case at bar possessed this property right and was wrongfully deprived of it by the conduct of Kirksey and the Board. At first blush, it appears that

plaintiff was afforded due process. A hearing was held in December 1983 at which the settlement agreement was consummated. Another hearing was held in May 1984 at which plaintiff's employment was terminated. It was the conduct of Kirksey in the interim and the Board's subsequent ratification of this conduct which was the constitutional violation.

Kirksey's subversion of the settlement agreement effectively negated the due process followed in the first hearing. This Court finds as fact that but for Kirksey's letter to the Army, plaintiff would not have lost his job as a result of the on-campus fight. The Army considered the matter settled prior to its receipt of that letter. Its

investigation was closed.

The Board made this violation of due process its own when it ratified Kirksey's action by firing plaintiff based on the result achieved by that letter. A school board is analogous to a municipal corporation in this respect. As the Supreme Court stated in Owen v. City of Independence: " A municipal corporation is liable to the same extent as an individual ... for any act which, after it has been done, has been lawfully ratified by the corporation." Owen v. City of Independence, 445 U.S. 622, 640, 100 S. Ct. 1398, 63 L. Ed. 2d 673, 687 (1980) (citation omitted). So it is with this school board.

Defendant school board and all other defendants in their official capacities in this case pleaded qualified governmental immunity as a defense. The issue of governmental immunity has undergone much change and development in recent years. It still has no clearly defined boundaries and must be examined on a case-by-case basis.

The position of the school board will be examined first.

The Supreme Court has stated that:

> [W]hether [a board of education] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend ... depends, at least in part, upon the nature of the entity created by state law. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 279 97 S. Ct. 568, 50 L. Ed. 2d 471, 479 (1977) (emphasis added).

This Court reluctantly recognizes that the state of Alabama equates county school boards with the state for purposes of tort liability under state law. The Alabama Supreme Court has stated that, thus classified, county boards of education "partake of the state's immunity from suit to the extent that the legislature authorizes." Hutt v. Etowah County Bd. of Educ., 454 So. 2d 973 (Ala. 1984). In an earlier case, that Court held "that a county board of education, while not an immediate agency of the State, acts in public and governmental capacity, and therefore is not liable for torts of its agents and employees, while so engaged, but it is ordinarily otherwise subject to suit. Its funds are State funds." Sims v. Etowah County Bd. of Educ., 337 So. 2d 1310, 1316 (Ala. 1976).

with these pronouncements in mind, this Court finds that the Board and its members in their official capacities are immune from suit as to the tort claims brought under state law in this case. Motion for such dismissal was made at trial, and a separate order to this effect has been entered.

The strong opinion of this Court is that its jurisdiction is maintained over the school board in regard to the 42 U.S.C. Section 1983 claims. as the supreme court stated in Monell v. New York City Dept. of Social Services: "Congress not only has shown no hostility to federal-court decisions against school boards, but it has indeed rejected efforts to strip the federal courts of jurisdiction over school boards." Monell v. New York City Dept. of Social Services 436 U.S. 658, 696, 98 S. Ct. 2018, 56 L. Ed. 2d

611, 639 (1978). The dictates of the Federal Constitution are absolute and imperative, and must take precedence over all else. Owen v. City of Independence. 445 U.S. at 685. Section 1983 was enacted to give "broad remedy for violations of federally protected civil rights." Monell, 436 U.S. at 685.

There have been certain restrictions placed on the nature of relief available from a governmental entity, and this opinion will abide by these limits. This Court cannot award backpay from the Board or its members in their official capacities, because the Board's funds have been held to be state funds. Sims, 337 So. 2d at 1316. Backpay would be deemed to flow from state coffers whether awarded as compensatory damages or as an aspect of equitable relief.

Parker v. Wallace, 596 F. Supp. 739, 746 (M.D. Ala. 1984). However, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury." Quern v. Jordan, 440 U.S. 332, 337, 99 S. Ct. 1139, 59 L. Ed. 2d 358, 364 (1979) (citations omitted). In the case now before it, this Court finds it proper to order such prospective relief. Plaintiff is to be reinstated as a tenured teacher in the Greene County public school system at salary appropriate to his years of service. This relief is in line with Alabama law which states that decision of the state tenure commission are to be final and conclusive. Ala. Code Section 16-24-38

(1975). "[T]he statutes are to be strictly construed in favor of the teachers in dismissal cases." Tuscaloosa City Board of Education v. Roberts, 440 So. 2d 1058, 1061 (Ala. 1983). The Alabama State Tenure Commission reinstated plaintiff's status as a tenured teacher. This Court finds that decision to be conclusive.

Defendant Kirksey and defendant board members in their individual capacities failed to plead qualified immunity as a defense. "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. Gomez v. Toledo, 446 US 635, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980)." Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396, 408 (1982). However, the issue was touched upon a trial and was dealt with

in post trial-briefs. Therefore, this Court will address the issue in this opinion.

The Supreme Court has laid out the standard which governs the application of qualified immunity, saying: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. at 818, 73 L. Ed. 2d 410 (1982). This test is an objective one. The Court in Harlow specifically deleted any subjective element from the test for the applicability of immunity. The Court defines the viable portion of the test, saying, "[q]ualified immunity would be

defeated if an official '<u>knew or reasonably should have known</u> that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff].'" <u>Id</u>. at 815 (emphasis is the Court's). The Court instructs us to rely "on the objective reasonableness of an official's conduct, as measured by reference to clearly established law." <u>Id</u>. at 818.

No premise of American law is more clearly established than one's right to due process. It strains credibility too far to say that the defendants were unaware of plaintiff's due process rights. They abrogated the valid product of a due process hearing, thereby nullifying the due process originally afforded through that hearing. That tenure is a property

right protected by due process requirements is knowledge with which this Court finds reasonable to charge these defendants. This Court is in firm agreement with the Court's statement in Harlow that "a reasonably competent public official should know the law governing his conduct." Id. at 819. A county superintendent of education and members of a board of education deal with tenure issues with great regularity, and its character is or should be well known to them.

Under this standard, this Court finds that plaintiff's property interest in his tenured position and his constitutional right to due process were clearly established at the time of the actions by defendants which gave rise to this cause. The objective reasonableness of the defendants'

conduct measured by reference to clearly established law is the only "circumstance" relevant to the issue of qualified immunity. Davis v. Scherer, _____U.S._____, 52 U.S.L.W. 4956, 104 S. Ct. 3013, 82 L. Ed. 2d 139 (1984). Measured by this standard, defendants' conduct is found lacking, and they are held to be ineligible for qualified immunity.

It is well established in common law jurisprudence that settlements are favored, will be enforced, and that subversion of a settlement agreement by a party thereto is not to be countenanced by a court of justice. Mellon v. Goodyear, 277 U.S. 335, 48 S. Ct. 541, 72 L. Ed. 906 (1928); Bass v. Crown Rig

Building Services, Inc., 749 F. 2d 1145 (5th Cir, 1985); Holmes v. Continental

Can Co., 706 F. 2d 1144 (11th Cir. 1983). This is an application in law of the simple moral principle that no one should make an agreement and then secretly and deliberately set out to destroy the benefit of that agreement to the other party. Such conduct is simply dishonest, perhaps even fraudulent. Kirksey was admittedly guilty of exactly this kind of misconduct, and the Board members, with full knowledge of what he had done, ratified his action. The Board dismissed plaintiff for losing his Army JROTC authorization, which was a direct result of Kirksey's misconduct in attempting to destroy the effect of a settlement which he himself had helped to negotiate and had agreed to. The Board members cannot have their cake and eat it, too. They made an agreement with plaintiff which they were bound to

keep, as both as matter of law and of honor. When they attempted to get out of that agreement by taking advantage of Kirksey's wrongful effort to get the Army to withdraw plaintiff's JROTC authorization, with knowledge of what Kirksey had done, they ratified Kirksey's action and made it their own. For public officials to deprive a citizen and public employee of his property rights in such a wrongful manner is plainly a deprivation of due process, both procedurally and substantively.

The court, therefore, finds it appropriate to award plaintiff backpay from defendant Kirksey and defendant Board members in their individual capacities. The Court further finds it appropriate to assess punitive damages against these defendants for their

blatant violation of plaintiff's rights. The court finds offensive the manner in which the superintendent and the Board broke their word as represented in the settlement agreement. Their conduct showed a serious disregard for the plaintiff's federally protected rights. As such, it supports an award of punitive damages under 42 U.S.C. Section 1983. Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983).

Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1983, the Court finds it appropriate to award attorney's fees and costs to plaintiff. All defendants officially and individually will be held jointly and severally liable for these sums. It is appropriate to hold responsible the Board as an entity as

well as all other defendants in their official capacities (in addition to their individual capacities) for these fees because the governmental entity's interests have been adequately represented throughout the proceedings. Leggett v. Badger, 759 F. 2d 1556 (11th Cir. 1985); Glover v. Ala. Dept. of Corrections, 734 F. 2d 691 (11th Cir. 1984).

DONE this the 6 day of December 1985.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.